

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LEONARD S. McDIFFETT, Jr. Claimant)	
VS.)	
FOOD SERVICES OF AMERICA Respondent)	Docket Nos. 177,095
AND)	& 177,096
TRAVELERS INSURANCE COMPANY UNIGARD INSURANCE COMPANY Insurance Carrier)	
AND)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

On August 22, 1996, the Application of the respondent and its insurance carrier Unigard for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge Bruce E. Moore dated March 19, 1996, came on for oral argument.

APPEARANCES

Claimant appeared by and through his attorney, Roger Struble of Salina, Kansas. Respondent and its insurance carrier, Travelers Insurance Company, appeared by and through their attorney, C. Stanley Nelson of Salina, Kansas. Respondent and its insurance carrier, Unigard Insurance Company, appeared by and through their attorney, Mickey W. Mosier of Salina, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, David G. Shriver of McPherson, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as specifically set forth in the Award of the Administrative Law Judge are adopted by the Appeals Board for purposes of this Award.

ISSUES**Docket No. 177,095**

- (1) Can Unigard file an appeal in Docket No. 177,095 when Unigard is a party only in Docket No. 177,096? Was this matter consolidated by the Administrative Law Judge prior to the Award?
- (2) Claimant's entitlement to future medical treatment.

Docket No. 177,096

- (1) Should the depositions of Dr. Daniel L. Ripa and Dr. Jeryl G. Fullen be considered as evidence by the Administrative Law Judge in Docket No. 177,096 when they were only stipulated into evidence in Docket No. 177,095?
- (2) The nature and extent of claimant's injury and/or disability.
- (3) Claimant's entitlement to future medical treatment.

Additional issues raised before and decided by the Administrative Law Judge but not appealed to the Appeals Board are affirmed insofar as they do not contradict the opinions expressed herein.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

The factual statements pertinent to this matter are accurately set out in the Award of the Administrative Law Judge. The Appeals Board will not reiterate same herein. It is sufficient to note that claimant suffered two injuries, one on April 12, 1988, and a second on September 4, 1992. Both injuries were to claimant's low back and both arose out of and in the course of claimant's employment with respondent, Food Services of America. The significant dispute herein stems from the fact Food Services of America was represented by Unigard Insurance Company at the time of the accident in 1988, with Travelers Insurance Company having the insurance coverage at the time of the accident in 1992. Claimant underwent medical treatment after both injuries and has returned to work. Claimant's disability in this matter is limited to a functional impairment per the agreement of the parties.

The Appeals Board must first consider whether or not these two matters were properly consolidated, granting Unigard the right to file an appeal in both Docket Nos. 177,095 and 177,096. It is significant in this instance that, while no specific order was entered by the Administrative Law Judge consolidating two docketed numbers, both cases were being treated as consolidated with the regular hearing and deposition testimony of Dr. Robert L. Eyster being taken at the same time in both cases. Dr. Eyster's appointment as the court-appointed physician was in both cases and Dr. Eyster testified as to both injuries. The Administrative Law Judge then entered a consolidated order setting forth terminal dates as though these matters were consolidated.

There are no designated rules concerning consolidation of workers compensation claims and how such is to come about in workers compensation proceedings. Review of both civil and criminal statutes outside the Workers Compensation Act provide little guidance as they only provide specific internal rules to follow when consolidation is considered appropriate. Those statutorily designated procedures would not apply to a workers compensation situation unless specifically noted in the Workers Compensation Act. It is noted, however, that the consolidation of workers compensation matters has become a common practice and at times best serves justice and judicial economy in workers compensation litigation. For the parties to be forced to spend the time and money involved in taking multiple depositions when consolidated depositions are appropriate would seem a waste of time, cost, and effort.

In the instant case, the Administrative Law Judge left the impression of a consolidation of these matters by allowing one regular hearing to suffice and by allowing the deposition of Dr. Eyster to be taken in both cases together, with all parties represented. We also note the order setting terminal dates by the Administrative Law Judge was a consolidated order involving all parties. Therefore, the Appeals Board finds that these matters were consolidated for the purpose of regular hearing and the deposition of Dr. Eyster and the appeal filed by Unigard is a proper appeal of both Docket Nos. 177,095 and 177,096.

The Appeals Board must next consider whether the depositions of Dr. Ripa and Dr. Fullen may be considered for the purpose of both cases.

It is significant that the stipulation filed by the parties in Docket No. 177,095 dealing with the depositions of the two doctors was filed subsequent to the expiration of the terminal dates of all parties. K.S.A. 1992 Supp. 44-523 discusses the requirements of the parties to submit evidence to the Administrative Law Judge and the limitations on the granting of extensions of time for the submission of evidence. K.S.A. 1992 Supp. 44-523 states in part:

- “(b) . . . An extension of the foregoing time limits may be granted:
- (1) If all parties agree;
 - (2) if the employee is being paid temporary or permanent total disability compensation;
 - (3) for medical examination of the claimant if the party requesting the extension explains in writing to the administrative law judge facts showing that the party made a diligent effort but was unable to have a medical

examination conducted prior to the submission of the case by the claimant but then only if the examination appointment was set and notice of the appointment sent prior to submission by the claimant; or
(4) on application for good cause shown.”

As claimant was not being paid temporary or permanent total disability compensation, no medical examination was requested and no application showing good cause was filed, the extension of terminal dates in this matter would only apply if all parties agreed. The submission of the medical depositions of Dr. Ripa and Dr. Fullen were stipulated to by all of the parties associated with Docket No. 177,095. There was no such stipulation with Unigard in Docket No. 177,096. As such, the Appeals Board finds that the medical depositions of both Dr. Ripa and Dr. Fullen are not admissible into evidence for purposes of Docket No. 177,096 as it was subsequent to the terminal date in that matter and all parties to that case did not stipulate to an extension of terminal dates. However, as all parties to Docket No. 177,095 did stipulate to the admissibility of the medical depositions then the Appeals Board finds, in that case, the depositions can be considered. While it seems contradictory to find that this matter was consolidated for the purpose of regular hearing in Dr. Eyster’s deposition and then find the matter was not consolidated for purpose of later depositions stipulated into evidence, it is nevertheless significant that the parties in connection with Docket No. 177,095 attended the regular hearing and deposition of Dr. Eyster and then, for reasons unknown, elected to provide a stipulation in Docket No. 177,095 without contacting or conferring in any way with the representatives of Unigard in Docket No. 177,096. This can only be seen as an intentional act on their parts to exclude Unigard from this stipulation and, at that point, terminate the consolidation for the purpose of gathering evidence. As such, the Appeals Board finds that medical depositions of Dr. Daniel L. Ripa and Dr. Jeryl G. Fullen will be considered for the purpose of Docket No. 177,095 but will be excluded from the evidentiary records of Docket No. 177,096.

What is the nature and extent of claimant’s injury and/or disability?

The Administrative Law Judge found that Dr. Eyster’s opinion assessing claimant an 8 percent permanent partial impairment for the April 12, 1988 injury to be the more credible medical rating. The Appeals Board finds for purpose of this Award that the opinion of the Administrative Law Judge is both accurate and appropriate and the Appeals Board adopts same as its own finding and conclusion as if specifically set forth herein.

The Administrative Law Judge found in Docket No. 177,095 that claimant suffered no additional disability as a result of his September 4, 1992 accident. This issue was not appealed to the Appeals Board and as such the findings of the Administrative Law Judge are adopted and affirmed as to this issue.

Claimant’s entitlement to future medical treatment.

The issue in this matter is not whether claimant is entitled to future medical treatment but rather which insurance carrier, Travelers or Unigard, should pay the expenses associated with same. Claimant suffered separate accidental injuries on two dates almost 4½ years apart. Both injuries were to claimant’s low back and both arose out of and in the course of claimant’s employment with respondent. However only Docket No.

177,096, the accident of April 12, 1988, resulted in any permanency to claimant's physical structure. Thus it would also seem logical that any ongoing medical treatment necessitated by these injuries would stem from the accident resulting in claimant having permanent damage with which to contend through the remainder of his life. As such, the Appeals Board finds claimant's entitlement to future medical treatment stems from the injury of April 12, 1988, in Docket No. 177,096.

AWARD

Docket No. 177,095

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Leonard S. McDiffett, Jr., and against the respondent, Food Services of America, and its insurance carrier, Travelers Insurance Company, and the Kansas Workers Compensation Fund, for an accidental injury which occurred on September 4, 1992, for any and all medical treatment provided as a result of that accidental injury. Additional award to claimant is herein denied. Respondent is granted 100 percent reimbursement from the Kansas Workers Compensation Fund for the medical treatment provided stemming from that accident.

Docket No. 177,096

WHEREFORE, an additional award of compensation is hereby entered in favor of the claimant, Leonard S. McDiffett, Jr., and against the respondent, Food Services of America, and its insurance carrier, Unigard Insurance Company, for an injury which occurred on April 12, 1988, for 415 weeks of permanent partial general body disability at the rate of \$18.46 per week totaling \$7,660.90 for an 8% permanent partial general body disability making a total award of \$7,660.90.

As of December 12, 1996, there is due and owing claimant 415 weeks of permanent partial general body disability compensation at the rate of \$18.46 per week in the sum of \$7,660.90 which is all due and owing and ordered paid in one lump sum less any amounts previously paid.

Further award is made entitling claimant to past medical expenses from respondent and its insurance carrier for the injury suffered on April 12, 1988.

Claimant is further entitled to unauthorized medical expenses up to the statutory maximum upon presentation of an itemized statement verifying same.

Future medical treatment for the April 12, 1988 injury will be considered upon application to and approval by the Director.

The Appeals Board finds claimant's attorney fee contract is acceptable so long as it is not in contravention to K.S.A. 44-536. A lien is placed against the award in the amount of 25 percent in favor of claimant's attorney.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier, Unigard, to be paid as follows:

Kelley, York & Associates, Ltd.	
Deposition of Dr. Robert L. Eyster	\$200.90
Owens, Brake, Cowan & Associates	
Transcript of Proceedings	\$326.70

IT IS SO ORDERED.

Dated this ____ day of December 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger Struble, Salina, KS
C. Stanley Nelson, Salina, KS
Mickey W. Mosier, Salina, KS
David G. Shriver, McPherson, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director